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SUPREME COURT, U.S.

No. 06-38

IN THE

Supreme Court of the United States

Detroit Entertainment, L.L.C.,
d/b/a MotorCity Casino, and
Marlene Brown,
Petitioners,

v.

Stella Romanski.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition demonstrated that certiorari is warranted to address the Sixth Circuit's holding that an arrest by security officers without probable cause constitutes "state action," giving rise to liability – including for massive punitive damages – under 42 U.S.C. 1983. That holding conflicts with this Court's jurisprudence because it deems irrelevant that the arrest was contrary to state policy. It also conflicts with other courts' holdings that similar arrests are not state action because the arrest power has not traditionally been reserved to the State. *Amicus* briefs attesting to the importance of the questions presented and the conflicts created by the ruling below and settled circuit precedent have been filed by both the State of Michigan and the state's Chamber of Commerce. Because respondent's arguments against review are unpersuasive, certiorari should be granted.[1]

1. Respondent does not seriously dispute that a long and uninterrupted line of Sixth Circuit precedent has abrogated this Court's holding that private conduct does not give rise to liability under 42 U.S.C. 1983 if it arises from "private misuse of a state statute" and "invoke[s] the statute without the grounds to do so." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 940, 941 (1982). In those circumstances, this Court has held, even private conduct undertaken by a "state *actor*" (because of its relationship to governmental roles or policies) may not constitute "state *action*" if it is not "caused by the

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[1] The questions presented are not only important to state action determinations nationwide, but they arise in a significant factual context. As the State explains in its *amicus* brief, numerous large facilities have participated in Michigan's "P.A. 330" program, alleviating the burden on police. Respondent's argument that only nine businesses remain in the program (BIO 7) ignores both their considerable size and that others have withdrawn as a result of the ruling in this case. As respondent explained, program participants who wish to avoid the prospect of massive punitive liability have only one option: to "not licens[e] their employees." BIO 24.

exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937.

The Sixth Circuit's contrary test for finding state action is clear. That court has repeatedly held – including in an en banc decision – that private conduct amounts to "state action" if it satisfies any of the "three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc). See generally Pet. 12-15 (citing numerous appellate and district court rulings applying the circuit's precedent). As the petition explained, that rule looks only to the second of the two parts to this Court's state action inquiry. The Sixth Circuit's test leaves no room for the first, critical inquiry into whether the private party was (a) implementing a state policy or instead (b) violating state policy. See *Lugar*, *supra*; *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1991) (reiterating, with emphasis in original, that "*both*" elements of the test must be satisfied).

Respondent does not seriously dispute that the Sixth Circuit's well-established rule was the basis for its holding in this case that petitioner Brown (a private party) engaged in state action by arresting respondent in circumstances expressly forbidden by state law – *i.e.*, without probable cause. To the contrary, the brief in opposition in important respects reinforces the petition's showing that the ruling below squarely conflicts with this Court's precedents. Respondent thus argues: "It is clear * * * that the court determined that Petitioners were 'exercising a right or privilege created by the state,' when it concluded that 'Brown ha[d] the authority to arrest a person without a warrant as set forth for public police officers . . . .' M.C.L. § 338.1080, *Romanski*, 428 F.3d at 638." BIO 12. That is *precisely* petitioners' point: the court of appeals found state action on the ground that Brown exercised the arrest authority, notwithstanding that the arrest was in *violation* of that authority, which state law limits to circumstances in

which there is probable cause to believe a crime has been committed. Respondent reinforces that point, explaining: "[Petitioner Brown] unquestionably used this statutory authority to arrest Ms. Romanski pursuant to a Casino policy *that violated Michigan law.*" *Id.* 16 (emphasis added). According to respondent, "Ms. Brown abused this authority with impunity." *Id.* 21-22. It is difficult to imagine a case in which the plaintiff's claim is more starkly that Section 1983 liability attaches when private parties are "acting contrary to the relevant policy articulated by the State" (*Lugar*, 457 U.S. at 940), which is of course precisely the proposition this Court rejected in *Lugar*.[2]

2. Respondent's direct answers to the petition's showing that this case presents an important opportunity to correct the Sixth Circuit's consistent departure from this Court's precedents are not substantial. First, she contends that petitioners waived this argument. The petition fully anticipated that assertion, however. As respondent acknowledges, this Court has jurisdiction if the question presented was either pressed in or passed upon by the court of appeals. See Pet. 18 n.5; BIO 10. Here, both of those elements are satisfied. Unquestionably, petitioners' principal argument below was that petitioner Brown's conduct did not amount to state action. In addition, the court of appeals rested its ruling that petitioners engaged in state action on its precedent (including the en banc decision in *Chapman*) holding that Section 1983 liability attaches whenever the defendant's conduct satisfies any of the three tests for identifying a state actor. See *id.* 16-18; Pet. App. 9a.

Obviously, this Court could decline to exercise its jurisdiction, and respondent hopes to suggest that it would be inequitable for the Court to take up this question in this case because petitioners supposedly are contradicting their argu-

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[2] Respondent's proper remedy is thus in the state law of false arrest, a claim on which she prevailed. Respondent frankly concedes that she pursued a Section 1983 claim because she otherwise would have been forbidden from securing punitive damages. BIO 9 n.11.

ment in the lower courts that the arrest was conducted with probable cause. See BIO 10-12. That is a non sequitur. There is nothing inconsistent in the contention that respondent's Section 1983 claim must fail as a matter of law for the dual reasons that (a) if she was in fact arrested without probable cause there was no "state action," or (b) if she was arrested with probable cause she has no claim on the merits. If Sixth Circuit precedent permitted petitioners to make the first of those arguments, they obviously would have done so. But respondent does not dispute that an uninterrupted line of circuit precedent precluded petitioners from seeking dismissal on the ground that respondent's theory is that petitioner Brown violated the state law basis for her authority to arrest. Such an argument is irrelevant in the Sixth Circuit and to press it would have been futile or even sanctionable.

Second, respondent makes a half-hearted attempt to contend that the Sixth Circuit has not abrogated the first prong of the *Lugar* inquiry. She contends that "in 32 of 36 cases, or 88% of the time, the courts in the Sixth Circuit summarily dismiss § 1983 claims for lack of state action." BIO 10. This argument is similarly a non sequitur. It does not cast any doubt upon the petition's showing that the Sixth Circuit's precedents deem irrelevant that the conduct underlying the plaintiff's suit is contrary to state policy. Respondent's math indicates at most that the Sixth Circuit's rule encourages the filing of frivolous Section 1983 suits. Nor is there anything "summary" about many of the decisions in question, which involve considerable expense to the defendants who are subject to meritless suits. To the extent that respondent hopes to suggest that the question presented arises rarely, that assertion is belied by this case and the en banc decision in *Chapman* (which remanded for further proceedings without regard to whether the conduct underlying the suit was consistent with state policy), by the other pending suits against petitioner MotorCity Casino (including a putative class action) involving very similar claims, and by the many decisions in other courts

of appeals dismissing claims based on the first prong of the *Lugar* inquiry. See Pet. 11, 14; Pet. App. 17a n.4.[3]

3. Respondent nonetheless asserts that review is not warranted because a security officer such as petitioner Brown is "trained, supervised, regulated, disciplined and subject to the control of the Michigan State Police" (BIO 1; see also *id.*) and is "a 'police officer' at the Casino" (*id.* 15). On this view, because petitioner Brown was not merely exercising a "public function" but instead was engaged in "joint action" with the police, the first prong of the *Lugar* standard is inapplicable. Although respondent's factual assertions are false (see *infra* at 7-9) – which is no doubt why the brief in opposition is almost entirely devoid of citations to the record or the governing statutes and regulations – the most important point for present purposes is that they are irrelevant as a matter of law.

The district court took the "state action" question away from the jury based on a single undisputed fact: that Michigan law authorized petitioner Brown to make an arrest in the same circumstances as a police officer. See Pet. 5-6. The court of appeals affirmed on that same ground. See *id.* 6-7. The sole legal theory of both the district court and the court of appeals was that Brown was exercising a "public function." See Pet. App. 10a-17a; *id.* 10a. And as noted, those courts held that petitioners were liable under Section 1983 without regard to whether Brown's conduct was consistent with, or instead contrary to, state law.

Given the procedural posture of the case, in which the district court precluded petitioners from putting the state action question before the jury, all the disputed facts regarding state law are necessarily construed in petitioners' favor. Accord Pet. App. 10a (explaining that because "the district court

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[3] Respondent contends that this Court denied certiorari on the Question Presented in No. 02-1646, *Higbee Co.* v. *Chapman*. In fact, the Question Presented in *Higbee Co.* was: "Whether the 'full and equal benefit' clause of 42 U.S.C. 1981(a) applies to the conduct of private entities that are not acting under color of state law."

took the state action issue out of the case, granting in effect judgment as a matter of law to Romanski on that issue," the Sixth Circuit would "review the state action aspect of the district court's decision *de novo* and view all facts in the light most favorable to Defendants").

The case thus comes to this Court on precisely the ground that the court of appeals decided it: notwithstanding that the arrest was (the lower courts concluded) conducted without probable cause, Brown's conduct constituted "state action" because she was exercising a public function. That holding flies squarely in the face of this Court's state action precedents. Because the Sixth Circuit's departure from this Court's jurisprudence is embodied in an uninterrupted line of decisions and (as the *amicus* briefs establish) the question is of great importance, there is no basis for avoiding review.

Respondent's factual claims thus establish at most that she is entitled to a trial on remand on her alternative "state action" theories. This Court need not now decide whether respondent is correct in her assertions that security police officers and the police engage in "joint action," with the asserted consequence that the first prong of the *Lugar* inquiry is inapplicable. That question does not arise here because that theory was not subject to trial and was not the basis for the district court's ruling or the court of appeals' affirmance.[4]

4. In any event, respondent's new factual claims are contrary to fact and the governing statutory scheme and necessar-

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[4] Petitioners pause to note the troubling consequence if a respondent were able to avoid review on a fact-bound ground not accepted by either of the lower courts. Respondents regularly hope to suggest that this Court will conclude that various factual claims *might* turn out to be true, rendering the case a poor vehicle to decide the questions presented. If that tactic were to succeed, certiorari could be defeated in innumerable important cases meriting this Court's review. But in any event, that dilemma does not even arise in this case given its procedural posture.

ily unsupported by the record. Four of the principal "facts" on which respondent relies are invented from whole cloth:

a. Respondent's assertion that "Brown and the Casino's security police officers are subject to the control of the Michigan State Police," BIO 7, is false. The police have *no* disciplinary authority over security police officers and *cannot* direct their activities. The relationship between the police and security police officers is spelled out in two statutory provisions, which create a simple "licensing" scheme and neither of which gives the police any role in the control of the security officers' conduct. See M.C.L. 338.1079, .1080.[5]

b. Respondent's assertion that Brown was under a duty "to 'report everything we do' to the Michigan State Police," BIO 3, is also false. None of the day-to-day responsibilities are supervised by the Michigan State Police or any other police agency, and the overwhelming majority of the daily actions of Casino security personnel – easily 99% – are not reported to the police. The quotation invoked by respondent relates to a narrow and targeted rule requiring the Casino to report the physical detention of patrons suspected of criminal activity – certainly not a common event at the Casino. See Mich. Gam. Control Bd. R. 432.11003. The very next sentence of the testimony in question, which respondent omits, thus explains that any such obligation is limited to when "you move somebody, detain them, [and] apprehend them" – *i.e.*, to arrests. 7/16/2003 Trans. 102. But that reporting obligation applies equally to *any* arrest by a private party.

c. Respondent's assertion that "Brown, and the other licensed security police officers underwent several weeks of

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[5] Respondent's claim is accurate in only one very limited sense: the Casino believes that it "would be required to make an arrest if the Michigan State Police instructed [it] to do so." BIO 7-8. But that "requirement" is not embodied in any statute or regulation; it is simply the Casino's sense of its obligations to cooperate with the police. Equally important, regular security guards would similarly be obliged to detain an individual at the direction of the police.

rigorous training by the Michigan State Police at the Police Academy in Detroit, Michigan," BIO 6; see also *id.* 7, 14, 19, 21, is false. As petitioner's counsel have re-confirmed with the State Police, such training never occurred. As Brown testified, she was trained by a local community college on its property; uniformed police officers participated only in an orientation session. A police training facility is located at the same college, but she was not trained (nor are security police officers as a rule) at that facility.

d. Respondent also asserts that Brown "is permitted to carry a handgun while on duty." BIO 6, 15. That is false. As Brown testified at trial (7/16/03 Trans. 148), governing regulations squarely prohibit her and other private parties from carrying a gun, see Pet. 5 (citing Mich. Gam. Control Bd. R. 432.1212). Respondent eventually acknowledges that fact, and is left to assert that (although she never did) Brown *could have* carried a firearm in the parking lot. BIO 20 n.19. Respondent would thus have this Court analyze this case on the dubious premise that the Casino could hire employees to distribute guns to guards as they came outside to inspect the parking area and retrieve the guns as they returned.

Two other non-record "facts" on which respondent relies are calculated exaggerations:

a. Respondent asserts that "the Michigan State Police maintains an office and officer at the Casino. The Detroit Police Department and [Michigan Gaming Control Board] also have offices and an officer at the Casino, 24 hours per day, 7 days a week." BIO 7. In fact, the Detroit Police have no such office; that claim is pure invention. Although the Board does have an office at the Casino (which the State Police also has use of), it does not always staff the office around the clock, while the State Police do not even staff the office on a consistent basis. But even the mere existence of that office – to which Casino officials have no access – illustrates the *difference* between the police and the Casino's own security officers.

b. Respondent's assertion that the background check applied to Brown was "similar to that of a police officer," BIO 14, is a substantial exaggeration. Respondent acknowledges that a security police officer is merely "obligated to meet minimum requirements related to age, security or law enforcement experience, and an absence of felony and certain misdemeanor convictions" (*ibid.*).

For all of the foregoing reasons, this case is an ideal vehicle in which to correct the Sixth Circuit's ongoing failure to adhere to this Court's holding that private conduct is not actionable "state action" if it is contrary to the underlying state policy in question.[6]

5. Certiorari is also warranted to resolve the conflict between the decision below and rulings of other circuits and highest state courts over whether the arrest power renders private security officers "state actors." This Court previously reserved judgment on that question (*Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 n.14 (1978)), which unquestionably is an important and recurring one on which the states and lower courts would benefit from this Court's guidance. See generally Michigan *Amicus* Br. (explaining that numerous states have similar statutory schemes). The root of the conflict is the view of other courts that the arrest power is not a public function because it has not traditionally been reserved to the states. See generally Pet. 19-24.

Respondent's contrary argument rests principally on her factual claims about the nature of security police officers under Michigan law. As just described, those assertions are both irrelevant as a matter of law in the procedural posture of the case and contrary to the statutory scheme and record.

As the case comes to this Court, the conflict with decisions of the Seventh Circuit is particularly stark. That court

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[6] Petitioners will not belabor respondent's hyperbolic factual assertions regarding the substance of her detention. It suffices to note that the jury found that she suffered $279.05 in actual damages.

holds that private security officers are "state actors" only "where the state had delegated its entire police power to a private police force." *Johnson* v. *LaRabida Children's Hosp.*, 372 F.3d 894, 897-98 (2004). See also *Payton* v. *Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (CA7 1999). It has twice rejected claims that officers similar to Brown were state actors, and approved a state action finding only when there was "no legal difference" between the guard and a "regular Chicago police officer." *Id.* at 630. See generally Pet. 22-24. As the State explains, the powers of security police officers in Michigan are much more circumscribed and are analogous instead to the powers of ordinary citizens.

Nor can this case be fairly distinguished from *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982). Respondent no longer defends the court of appeals' attempt to distinguish *Impens* on the inaccurate ground that the plaintiff had not been sufficiently detained in that case, see Pet. 21 & n.6; Pet App. 13a n.2, relying instead on the fact that the guards in *Impens* were not "private security officers," see BIO 22-23. But the court of appeals did *not* rely on that distinction because it was not relevant to its holding that the "arrest" power gives rise to state action. As described by the State, that power is not limited to private security officers.[7]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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[7] For the reasons described in the petition, if this Court does not review the court of appeals' decision, the case should be held pending the disposition of No. 05-1256, *Philip Morris USA* v. *Williams*, which – like this case – involves a very high ratio of compensatory to punitive damages based on the supposed outrageousness of the defendant's conduct.

Respectfully submitted,

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